UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Cortez Austin

CV–03-3336 (CPS)

Plaintiff,

- against -

MEMORANDUM OPINION AND ORDER

Jo Anne B. Barnhart, Commissioner of Social Security,

Defendant.

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SIFTON, Senior Judge.

In 2003, plaintiff Cortez Austin brought an action to review a final determination by Commissioner Jo Anne B. Barnhart ("Commissioner") of the Social Security Administration that plaintiff was not entitled to disability insurance benefits ("SSD") or Supplemental Security Income ("SSI"). This Court remanded the case to the Commissioner for further proceedings, subsequent to which the plaintiff was awarded benefits by the Administrative Law Judge ("ALJ"). Plaintiff's counsel now moves for $17,833.13 in attorney's fees pursuant to 42 U.S.C. §406(b).[1] For the reasons set forth below, this motion is granted.

Background

Plaintiff filed an application for disability benefits on

[1] Specifically, counsel moves for the release of $6,643.50 in fees already granted in this Court under the Equal Access to Justice Act ("EAJA") which have yet to be paid and for an award of $11,189.63 in additional fees.

February 17, 2000 and retained Charles Binder, Esq., of the firm Binder and Binder, P.C., to represent him on May 22, 2000. Plaintiff and the firm signed a retainer agreement indicating that the fee for successful representation would be 25% of past-due benefits awarded to plaintiff.

On October 25, 2001, plaintiff, with counsel, appeared before an ALJ, who subsequently found the plaintiff not disabled within the meaning of the Social Security Act in an opinion dated November 23, 2001. The Appeals Council denied plaintiff's request for review on May 9, 2003, at which point plaintiff initiated proceedings in this Court. On May 12, 2004, this Court remanded the case for further proceedings. On December 19, 2005, plaintiff again appeared before an ALJ who, on January 5, 2006, found the plaintiff disabled and awarded benefits.

Plaintiff's counsel spent 43 hours working on plaintiff's federal court case, in addition to an unspecified number of hours spent on administrative proceedings. Plaintiff's attorney has already been awarded fees of $6,643.50 by this Court for work done in the federal court case under the EAJA.[2] Pursuant to 42 U.S.C. §406(b),[3] plaintiff's counsel now requests an additional

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[2] According to counsel, that money has not yet been released by the Commissioner, though there is no question that counsel is entitled to that money pursuant to this Court's earlier order with regards to the EAJA application.

[3] Counsel notes in his brief that the normal procedure for obtaining fees in a case such as this in which the benefits were granted by an Administrative Law Judge would be to first apply to the Commissioner under §

$11,189.63 in fees for work done in the federal case, as well as the release of the fees previously granted under the EAJA, for a total fee award of $17,833.13; this total represents 25% of the total past-due benefits awarded to plaintiff. Plaintiff consents to this request and writes that he is "completely satisfied" with his representation. The United States does not oppose this motion.

Discussion

42 U.S.C. § 406(b) permits an award of attorney's fees for time spent representing a social security claimant before a federal court of up to 25% of the past-due benefits ultimately awarded. Courts have an obligation to review fee requests and deny any part which they find "unreasonable." *Wells v. Sullivan*, 907 F.2d 367, 370 (2d Cir. 1990).

The Second Circuit has held that contingency fee arrangements such as the one before this Court are presumptively reasonable and, while courts must still review fee requests made pursuant to such a contingency agreement,

> [w]e must recognize . . . that a contingency agreement is the freely negotiated expression both of a

406(a). However, counsel is concerned that recent decisions in other circuits which require a timely request under § 406(b) may complicate his ability to first apply to the Commissioner and then follow-up in this Court if his application is not fully satisfied. As a result, counsel applied to this Court after receiving the notice of award on November 13, 2006. *See Bergen v. Commissioner of Social Sec.,* 454 F.3d 1273, (11th Cir. 2006); *McGraw v. Barnhart,* 450 F.3d 493 (10th Cir. 2006)

> claimant's willingness to pay more than a particular hourly rate to secure effective representation, and of an attorney's willingness to take the case despite the risk of nonpayment. Therefore, we ought normally to give the same deference to these agreements as we would to any contract embodying the intent of the parties.

Id. at 371. Courts should also "balance the interest in protecting claimants from inordinately large fees against the interest in ensuring that attorneys are adequately compensated so that they continue to represent clients in disability benefits cases" when considering reasonableness. *Joslyn v. Barnhart,* 389 F.Supp.2d 454, 456 (W.D.N.Y. 2005) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 805 (2002)).

Courts evaluating the reasonableness of a fee agreement generally look at factors such as "whether the contingency percentage is within the 25 percent cap in the Act, whether there has been fraud or overreaching in making the agreement, and whether the requested amount is so large as to be a windfall to the attorney." *Boyd v. Barnhart,* 2002 WL 32096590, at *2 (E.D.N.Y. 2002) (internal citations omitted).

In the present case, the total amount requested is 25% of the amount awarded to the plaintiff, in accordance with the contingency fee agreement and in line with the Social Security Act's limitations. Further, there is no evidence of any overreaching, and the plaintiff himself has stated that he is "completely satisfied" with the work performed by counsel and

believes the 25% fee is reasonable. As for the potential for a windfall,

> [a]lthough there is no clear set of criteria for determining when an award would result in a windfall, it is clear that there are certain factors which should be considered. These factors include 1) whether the attorney's efforts were particularly successful for the plaintiff, 2) whether there is evidence of the effort expended by the attorney demonstrated through pleadings which were not boilerplate and through arguments which involved both real issues of material fact and required legal research, and finally, 3) whether the case was handled efficiently due to the attorney's experience in handling social security cases. Additionally, when conducting a reasonableness analysis, courts may take into account the amount of time and effort the attorney expended at the administrative level.

Joslyn, 389 F.Supp.2d at 456-57 (internal citations omitted).

Counsel spent 43 hours preparing the federal case, and requests a total fee of $17,833.13.[4] Counsel's efforts were clearly successful since plaintiff's case was remanded and he was ultimately awarded benefits after initially being denied. Counsel's skill in briefing and argument must be credited. Counsel also submitted a detailed memorandum which evaluated the relationship between the factual background of the case, the ALJ's findings and the legal standards, in particular with regards to the "treating physician" rule; while the legal issues were not novel, they involved the resolution of issues of fact and counsel did much more than simply make boilerplate

[4] This comes to an hourly rate of approximately $414/hour.

assertions.[5] Counsel's many years of experience in this area of law contributed significantly to the efficiency of his legal research and plaintiff's successful outcome.[6] *See Lacatena*, 785 F.Supp. At 322 ("[B]ecause of attorney['s] experience in handling social security cases, it is highly likely that he expended fewer hours than less experienced attorneys may require."). Additionally, although counsel does not specifically seek compensation for the hours which were taken up by the renewal of administrative proceedings, significant effort was clearly expended on remand. The fact that counsel risked non-payment must also be considered in his favor when evaluating the reasonableness of the fees. *See Wells*, 907 F.2d at 370-71 ("[E]nhancements for the risk of nonpayment are appropriate considerations in determining § 406(b) fees. In the absence of a fixed-fee agreement, payment for an attorney in a social security case is inevitably uncertain, and any reasonable fee award must take account of that risk.") (internal citations and quotations

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[5] Although the itemized list of hours submitted to the Court lists less than four hours as "legal research" or "research work on brief" this is presumably due to the fact that plaintiff's counsel has been involved in many similar cases before and is already familiar with the law. *See Lacatena v. Sec'y of Health & Human Servs.*, 785 F.Supp. 319, 322 (N.D.N.Y. 1992) (an experienced attorney "should not be penalized for his efficiency by basing his reimbursement on a lower hourly rate"). In addition, presumably some of the additional twenty plus hours which were spent writing and editing the brief involved legal research as well.

[6] Counsel states that he has handled thousands of administrative hearings and hundreds of appeals in federal court, and has been actively involved with the legal community dealing with social security issues. The attorney who did the bulk of the work on this case "frequently" appears before courts of this district on social security matters.

omitted).

Accordingly, "keeping in mind the deference owed to the agreement between the attorney and the plaintiff, the interest in assuring that attorneys continue to represent clients such as the plaintiff, and the lack of any factor indicating that the requested award would result in a windfall to the attorney," *Joslyn*, 389 F.Supp.2d at 457, counsel's application for fees totaling $17,833.13 is granted, to be paid from the amounts currently being withheld from plaintiff's award by the Commissioner. *See Id.*(approving an award of contingency fee which calculated to over $890/hour); *Boyd,* 2002 WL 32096590 at *3 (approving an award of contingency fee which calculated to over $450/hour); *Lacatena*, 785 F.Supp. at 322 (approving an award of contingency fee which calculated to over $825/hour).[7]

Conclusion

For the reasons stated above, the motion for fees in the amount of $17,833.13 is granted. The Clerk is directed to transmit a copy of the within to the parties.

[7] Normally, to avoid overpayment to counsel, "if an award for attorney's fees is ordered both pursuant to the EAJA and pursuant to 42 U.S.C. § 406(b)(1), the lesser of the two awards must be returned to the claimant." *Joslyn*, 389 F.Supp.2d at 454 (citing *Gisbrecht*, 535 U.S. at 796). Here, however, there is no such concern since counsel has not yet been paid the amount awarded under the EAJA.

SO ORDERED.

Dated : Brooklyn, New York
March 5, 2007

By: /s/ Charles P. Sifton (electronically signed)
United States District Judge